

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT BECKLEY

MACOMB COUNTY EMPLOYEES'	)	No. 5:10-cv-00689-ICB
RETIREMENT SYSTEM, Individually and on	)	
Behalf of All Others Similarly Situated,	)	<u>CLASS ACTION</u>
	)	
Plaintiff,	)	The Honorable Irene C. Berger
	)	
vs.	)	
	)	
MASSEY ENERGY COMPANY, et al.,	)	
	)	
Defendants.	)	
	)	
<hr/>	)	
FIREFIGHTERS' RETIREMENT SYSTEM	)	No. 5:10-cv-00776-ICB
OF LOUISIANA, Individually and on Behalf	)	
of All Others Similarly Situated,	)	<u>CLASS ACTION</u>
	)	
Plaintiff,	)	The Honorable Irene C. Berger
	)	
vs.	)	
	)	
MASSEY ENERGY COMPANY, et al.,	)	
	)	
Defendants.	)	
	)	
<hr/>	)	

REPLY BRIEF IN FURTHER SUPPORT OF DAVID WAGNER'S MOTION TO STRIKE OR  
IN THE ALTERNATIVE FOR LEAVE TO FILE A SURREPLY

Wagner respectfully submits this *brief* reply in support of his motion to strike improper new arguments, or in the alternative for leave to file the surreply attached hereto as Exhibit 1.<sup>1</sup> Further demonstrating the need to strike the Reply Memorandum of Law in Further Support of the Motion of the Commonwealth of Massachusetts Pension Reserves Investment Trust for Consolidation, Appointment as Lead Plaintiff, and Approval of Selection of Lead Counsel (“PRIM Reply”) (Docket #36), the Commonwealth of Massachusetts Pension Reserves Investment Trust (“PRIM”), has filed yet another lengthy brief attempting to oppose (and stipulate in part to) Wagner’s motion, in which PRIM attempts to again improperly assert its same belated arguments from its Reply, and yet still more new arguments. PRIM’s reliance on numerous cases that stand for the proposition that the Court can revisit its lead plaintiff decision at any stage of the litigation does nothing to correct PRIM’s admittedly improper new and belated arguments in its Reply. Contrary to what PRIM may believe, its belated arguments are not identical to the Court revisiting its own lead plaintiff decision. *Nothing* in the decisions relied upon by PRIM gives a *movant* unlimited time to oppose a competing movant.

PRIM’s belated arguments to Wagner’s motion in PRIM’s Reply is a blatant attempt to circumvent the Local Rules of this Court which give a party 14 days to oppose a motion. PRIM did not file its arguments timely in the opposition brief it filed on July 15, 2010. There is absolutely no reason whatsoever that PRIM could not have made its arguments in that brief. It did not, and its arguments should be stricken. In addition, *nothing* in the PSLRA can be construed to allow a party to disregard the local rules of a court which designate the proper time for opposition, or whose law specifically frowns upon raising new arguments in a reply memorandum.

---

<sup>1</sup> Also, attached as Exhibit 2 is the Declaration of John F. Dascoli in Support of Surreply Memorandum in Further Support of David Wagner’s Motion for Appointment as Lead Plaintiff.

PRIM actually admits that it disregarded the rules of this Court when it made its belated argument against Wagner in its Reply. It concedes that if its improper arguments are not stricken, then Wagner should be granted leave to file the surreply concerning PRIM's improper arguments. This attempted stipulation is all the more reason to strike PRIM's arguments. PRIM believes that it can ignore established legal principles and rules of the Court.

Although PRIM stipulates to allowing Wagner to address PRIM's improper arguments in one section of its Reply, the entirety of Wagner's surreply should be considered. PRIM's Reply raises for the very first time ever in this case what PRIM hopes the Court will view as a new partial disclosure, despite the fact that the disclosure in October 2009 was not alleged in either complaint and was not mentioned in PRIM's statement of facts in support of its own lead plaintiff motion. Thus, the new "partial disclosure" is a proper issue for Wagner to address in his surreply, if it is not stricken altogether.

Finally, Wagner's surreply addresses PRIM's accusations that Wagner and his counsel have abandoned the longer class period, and thus, a portion of the class. Wagner's surreply based upon this section of PRIM's brief is necessary as it demonstrates not only how PRIM has misconstrued the nature of Wagner's arguments, but also demonstrates that Wagner's arguments are authorized by the PSLRA. PRIM's attacks against Wagner and its counsel should not be left unaddressed.

Wagner respectfully requests that the Court strike PRIM's improperly raised arguments, some of which it actually *admits* are improper. In the alternative, Wagner requests that the Court consider the attached surreply to respond to the new issues raised for the first time in PRIM's Reply.

DATED: August 2, 2010

JOHN F. DASCOLI, PLLC  
JOHN F. DASCOLI (SBID #6303)

---

s/ JOHN F. DASCOLI  
JOHN F. DASCOLI

2442 Kanawha Boulevard, East  
Charleston, WV 25311  
Telephone: 340/720-8684  
304/342-3651 (fax)

[Proposed] Liaison Counsel

ROBBINS GELLER RUDMAN & DOWD LLP  
DARREN J. ROBBINS  
TRICIA L. MCCORMICK  
LAURIE L. LARGENT  
655 West Broadway, Suite 1900  
San Diego, CA 92101  
Telephone: 619/231-1058  
619/231-7423 (fax)

ROBBINS GELLER RUDMAN & DOWD LLP  
DENNIS J. HERMAN  
CHRISTOPHER M. WOOD  
100 Pine Street, Suite 2600  
San Francisco, CA 94111  
Telephone: 415/288-4545  
415/288-4534 (fax)

[Proposed] Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice Lists, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice Lists, and to:

Burton LeBlanc  
Mazin Sbaiti  
Baron & Budd, P.C.  
3102 Oak Lawn Avenue, Suite 1100  
Dallas, TX 75219-4281

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 2, 2010.

s/ JOHN F. DASCOLI  
JOHN F. DASCOLI (SBID #6303)

JOHN F. DASCOLI, PLLC  
2442 Kanawha Boulevard, East  
Charleston, WV 25311  
Telephone: 340/720-8684  
304/342-3651 (fax)

E-mail: johnfdascoli@hotmail.com

## Mailing Information for a Case 5:10-cv-00689

### Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Jonathan L. Anderson**  
jlanderson@jacksonkelly.com
- **Eric J. Belfi**  
ebelfi@labaton.com
- **John F. Dascoli**  
johnfdascoli@hotmail.com,Pamdc519@aol.com
- **Alan I. Ellman**  
aellman@labaton.com
- **Samuel D. Elswick**  
selswick@jfhumphreys.com
- **A. L. Emch**  
aemch@jacksonkelly.com,sra@jacksonkelly.com,jcrawford@jacksonkelly.com
- **Thomas V. Flaherty**  
tflaherty@fsblaw.com,cmontague@fsblaw.com
- **Troy N. Giatras**  
troy@thewvlawfirm.com,pam@thewvlawfirm.com
- **Tammy R. Harvey**  
tharvey@fsblaw.com,cmontague@fsblaw.com
- **Dennis J. Herman**  
DennisH@rgrdlaw.com
- **Christopher J. Keller**  
ckeller@labaton.com
- **James A. McKowen**  
Jmckowen@jfhumphreys.com,Dhoffman@jfhumphreys.com,Dmilhoan@jfhumphreys.com,Cs1jam@aol.com
- **Bradley J. Pyles**  
brad.pyles@cphltlogan.com,bjpyles@suddenlink.net
- **Darren J. Robbins**  
e\_file\_d@csgrr.com
- **Ronald S. Rolfe**  
rrolfe@cravath.com,jsneider@cravath.com,managing\_attorneys\_office@cravath.com,sthompson@cravath.com
- **Stefanie J. Sundel**  
ssundel@labaton.com
- **Christopher M. Wood**  
CWood@rgrdlaw.com

## Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

**Stephen L. Brodsky**

ZWERLING SCHACHTER & ZWERLING  
32nd Floor  
41 Madison Avenue  
New York, NY 10010

**David A.P. Brower**

BROWER PIVEN  
488 Madison Avenue, Eighth Floor  
New York, NY 10022

**Laurie L. Largent**

ROBBINS GELLER RUDMAN & DOWD  
Suite 2600  
100 Pine Street  
San Francisco, CA 94111

**Tricia L. McCormick**

ROBBINS GELLER RUDMAN & DOWD  
Suite 1900  
655 West Broadway  
San Diego, CA 92101

**Thomas C. Michaud**

VANOVERBEKE MICHAUD & TIMMONY  
79 Alfred Street  
Detroit, MI 48201

**Julie A. North**

CRAVATH SWAINE & MOORE  
Worldwide Plaza  
825 Eighth Avenue  
New York, NY 10019

**Charles J. Piven**

BROWER PIVEN  
1925 Old Valley Road  
Stevenson, MD 21153

**Robert Schachter**

ZWERLING SCHACHTER & ZWERLING  
32nd Floor  
41 Madison Avenue  
New York, NY 10010

**Richard A. Speirs**

ZWERLING SCHACHTER & ZWERLING  
32nd Floor  
41 Madison Avenue  
New York, NY 10010

**Michael J. Vanoverbeke**

VANOVERBEKE MICHAUD & TIMMONY  
79 Alfred Street  
Detroit, MI 48201

**David C. Walton**

ROBBINS GELLER RUDMAN & DOWD  
Suite 1900  
655 West Broadway  
San Diego, CA 92101